

### **REMARKS**

The Office Action mailed on July 9, 2009 has been carefully reviewed and this paper is responsive thereto. Claims 1, 3-7, 10-13, 15-21, 24 and 25 are pending. Claims 1, 3-7, 10-13, 15-21, 24 and 25 stand rejected. Claim 18 has been amended.

#### **Rejections Under 35 USC §103**

Claims 1, 3-7, 10-11, 15-17, 19-21, 24 and 25 are rejected under 35 USC §103(a) as being unpatentable over Akihiko, et al., JP 2001323263 (“Akihiko”). Applicant respectfully traverses this rejection. Akihiko discloses preventing color fading in a natural color through the use of coffee bean extract. As stated in page 5 of the instant Office Action, the Akihiko reference is very narrow, as it does “not disclose use of botanical extracts other than coffee bean extract.” However, the Office Action considers that Akihiko teaches the “concept of preventing color fading using botanically derived color stabilizers.” Applicant respectfully disagrees that Akihiko teaches such broad concepts. Rather, as admitted on page 5 of the Office Action, Akihiko teaches *only* a method for inhibiting the fading of natural pigments using a coffee bean extract as an active ingredient (fading inhibitor).

The Office Action, pp 2-3, states that “[r]egarding ‘*synthetic* color’ limitation, Akihiko et al disclose industrial riboflavin preparation (p. 3 [0014]).” Applicant respectfully disagrees that the page cited in Akihiko discloses industrial production of riboflavin. From the rough translation reviewed and cited by the Office Action, it is at best unclear what type of riboflavin Akihiko teaches. One of ordinary skill in the chemical arts understands that there are many ways to arrive at a riboflavin color additive, such as extraction, fermentation, or via synthetic means. Because Akihiko teaches away from the use of synthetic colors (see p. 10 of Applicant’s June 20, 2009 response) and only teaches the use of coffee bean extract to prevent fading of *natural* colors, one would be lead to conclude that the riboflavin taught in Akihiko is a *natural* colorant.

Applicant also disagrees that one of ordinary skill in the art would have been motivated to employ teachings of Akiko to solve the problem of color fading. Although natural and synthetic colors are both used to add color to food and beverage products, their similarities end there. Synthetic colorants are made from inorganic compounds. Moreover, Paragraphs [0009] -

[0010] of the instant application demonstrate that ionic interactions between the rings of the color stabilizer and a natural color *are all structurally dependent*. Since the structures of synthetic colors differ significantly from those of natural colors, it would not have been obvious for one of skill in the art of the food sciences at the time the invention was made to arrive at a color composition including a synthetic color and a botanically derived color stabilizer containing a C6-C3 phenylpropenoic carbonyl structure to prevent color fading as set forth in claims 1, 20, 21, and 24-25 of the instant application. Moreover, applicant reiterates that natural and synthetic colors fade via different mechanisms. Natural colors fade by an oxidative mechanism whereas synthetic colors fade by a reductive chemical mechanism. *See* Paragraphs [0008] & [0014]-[0018] of the instant application. For the reasons mentioned herein a person of ordinary skill in the art at the time of the invention would not have been motivated to employ the teachings of Akiko to prevent fading of synthetic colors.

The Office Action further notes that “color additives as recited and taught by Akihiko et al are functional equivalents known for the same purpose” and therefore “it would have been obvious to substitute one for another.” Applicant respectfully disagrees and notes that in order to rely on equivalence as a rationale supporting an obviousness rejection, the equivalency must be recognized in the prior art, and cannot be based on applicant’s disclosure or the mere fact that the components at issue are functional or mechanical equivalents. *In re Ruff*, 256, F.2d 590; MPEP 2144.06. Examiner has failed to cite any art to show that synthetic and natural color additives are recognized as equivalents in the prior art.

In light of the foregoing arguments, independent claims 1, 20 and 21 are patentable over the prior art. The dependent claims are patentable over the cited art for at least the same reasons as these independent claims, and for the additional features recited therein.

Claims 12-13 and 18 are rejected under 35 USC 103(a) as being unpatentable over Akihiko in view of Coffee: Related Beverages (“Coffee”). Applicant respectfully traverses this rejection. Claims 12 and 13 do not refer to or otherwise disclose dandelion root extract or hawthorn extract. Moreover, dandelion root and hawthorn root are not chalcones or flavones. Therefore, COFFEE does not disclose limitations, and claims 12-13 are patentable over Akihiko in view of COFFEE. Claim 18 has been amended. Akihiko or COFFEE either alone or in

combination, fail to disclose all of the limitations in amended claim 18. Applicant respectfully requests reconsideration of the claims and a notice of allowance with respect to these claims.

### CONCLUSION

In summary, for the reasons set forth herein, it would have been unobvious to one of ordinary skill in the art, at the time the invention was made, to modify the teaches of the references cited in the Office Action to make the long shelf-life high moisture oatmeal described in the present application. Applicant respectfully requests reconsideration of the pending claims and a finding of their allowability. A notice to this effect is respectfully requested. Please feel free to contact the undersigned should any questions arise with respect to this case that may be addressed by telephone.

Respectfully submitted,

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